WRITTEN TESTIMONY OF MYRON H. NORDQUIST

ASSOCIATE DIRECTOR AND EDITOR

CENTER FOR OCEANS LAW AND POLICY

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

REGARDING "PENALTY WAGE" AND RELATED DUE PROCESS AMENDMENTS TO TITLE 46, UNITED STATES CODE

HEARING ON

THE FISCAL YEAR 2007 COAST GUARD AUTHORIZATION ACT

BEFORE THE

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

JUNE 20, 2006

Thank you Chairman LoBiondo and Members of the Subcommittee. My name is Myron H. Nordquist and I am privileged and honored to testify today on proposed penalty wage and related due process amendments to Title 46 of the United States Code.

BACKGROUND

My academic observations are personal comments and are not intended to reflect the views or policy positions of the Center for Oceans Law and Policy or the University of Virginia School of Law. Briefly, I am a semi-retired law professor who has served, among other duties, for 30 years as Editor-in-Chief of the Virginia Commentary on the 1982 Convention on the Law of the Sea. The preparation of the Commentary was a collegiate effort at the Virginia Center with some 100 scholar-diplomats from around the world. The goal was to identify the sources for and provide an objective commentary on the 320 articles and nine annexes in the 1982 Convention, some times called a "Constitution for the Oceans." The sixth and last volume in the Commentary was published last year, with the series as a whole containing some 4,000 pages of citations and line-by-line analysis of the maritime law provisions in the 1982 Convention. I believe that it was due largely to my work on the Commentary at the Center that led to my being contacted recently by the International Council of Cruise Lines ("ICCL"). The ICCL asked for my comments on proposed amendments to the wage penalty and related provisions in Title 46 of the United States Code. Subsequently, the Subcommittee invited me to present testimony today on substantially similar proposed amendments.

My overall reaction is that the existing law pertaining to penalty wage provisions, while historically understandable, is out of date. I respectfully submit that the proposed amendments provided by the Subcommittee genuinely promote a better and more equitable maritime policy for passenger vessel "seamen" (many of whom in the cruise industry are now more akin to hotel or restaurant employees) as well as for masters, owners, operators and employers. Moreover, as elaborated in my testimony, my view is that the proposed amendments reflect sound public policy and ought to be incorporated into updated chapters in Title 46 of the United States Code.

The Members and staff are well aware that United States laws often differ depending upon whether the vessel in question is in a foreign and intercoastal voyage or in a coastwise voyage. Thus, proposed amendments intended to impact both types of voyages must often amend different provisions in separate chapters of Title 46, even if the text of the proposed amendments for each respective category of voyage reads just about the same. For this reason, proposed amendments to Title 46 can be cumbersome to express precisely in narrative form. I apologize in advance to the Members and staff of this Subcommittee for redundancies in my testimony occasioned by my effort to be clear and concise about the legal implications of the proposed amendments in the complicated context of Title 46.

FOREIGN AND INTERCOASTAL WATERS (Chapter 103)

Existing law pertaining to voyages in foreign and intercoastal waters is found in Chapter 103 of Title 46, United States Code. Section 10313 provides that a seaman's entitlement to wages begins when the seaman begins work, or as specified in the shipping agreement. Section 10313 also qualifies a seaman's entitlement to wages if the vessel is lost or wrecked, if the seaman is discharged improperly, if the seaman unlawfully fails to work or if the seaman is imprisoned. Procedures are provided for the payment of wages at each port on cargo ships, and at the "end of the voyage" as defined by applicable case law. Interestingly, the section applies to seamen on foreign vessels in United States harbors, but not to fishing vessels, whaling vessels or yachts.

The wage penalty and related statutes which the proposed amendments fix were originally enacted in 1790, with increasingly severe penalties through amendments in 1872, 1898 and, finally, in 1915. It is noteworthy that the last update was at the beginning of the last century. Traditionally, law makers promoted maritime commerce by trying to accommodate fairly the competing demands of the vessel owner and crew, most of whom were traditional seamen. Given the relative disparity between owners and crew, penalty wage provisions were enacted to encourage prompt payment of wages due to seaman and to impose penalties where non-payment was inexcusable.

Much has changed in the last 90 years: vessels and crews are much larger, treatment of seamen, many of whom are women, is more humane, and a global economy has come with major advances in communications and methods of doing business. Updating the law, especially in the case of the cruise lines and other passenger vessels operating in the United States, ought to be understandable. The obvious concern of the First Congress, over 200 years ago, was to provide incentives to ensure that masters or owners did not improperly withhold wages, thereby unjustly enriching themselves while wrongfully denying seamen the fruits of their labor. This equitable notion is as appealing today as it was with Members from over 100 Congresses ago. Individual seamen ought as a matter of sound public policy to be protected from arbitrary and unscrupulous treatment by more powerful masters or owners. That is not to say, however, that it is fair or sound public policy to impose grossly disproportionate penalties where sufficient cause exists to doubt whether the wages at issue are due and owing.

This brings me to comment on the most important provision in the Subcommittee's penalty wage proposal: the "notice and remedy" section. The proposed amendments do **not** change the current wage penalty, but rather they introduce a straightforward procedure to settle disputes in a timely fashion. Indeed, as discussed below, the antiquated provisions of the seamen wage statutes, including the existing penalty provisions, grant foreign hospitality workers on foreign cruise ships far greater protections, including more onerous penalties, than are provided for any American workers, of which I am aware.

PENALTY PROVISIONS

Turning to the statutory provisions involving penalties for failure to pay wages properly, the proposed amendments do not change the existing requirement of Section 10313 (f) that upon discharge a seaman must be paid at least 1/3 of his final wages immediately, and the balance within the earlier of either 24 hours after cargo is unloaded or 4 days. Instead, the proposed amendments improve the current subsection (g) of existing law, which reads:

> (g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

While the proposed amendments do not change the prescribed penalty amount at all, they do strike "When" in subsection (g) above and insert:

> "(1) Except as provided in paragraph (2), when".

Next, the **most important procedural improvements** from a due process of law standpoint in the entire package of proposed amendments are made by inserting a new paragraph (2) to read:

> (2) A seaman serving on a passenger vessel shall notify the master, owner, operator or employer in writing of any claim that a payment was not made as provided in subsection (f) of this section without sufficient cause, within 180 days of the seaman's receipt of the information giving notice of any disputed payment, or 30 days after the termination of the seaman's employment contract, whichever occurs later. A penalty payable under the subsection, if any, shall accrue only after the expiration of 60 days from receipt by the master, owner, operator or employer of such written notice from the seaman and the failure by the recipient of such notice either to (a) cause to be paid the amount disputed or (b) cause to be deposited the amount disputed into an interest bearing account and commence appropriate legal action to determine whether the claim has merit. A penalty assessed under this subsection shall not exceed 2 days' wages for each day payment is delayed. The seaman's failure to give the notice required under this subsection shall be a bar to any claim or penalty under this subsection.

The above new paragraph brings modern due process procedures for all concerned: seamen, masters, owners, operators and employers. If these due process procedures are added to Title 46, the 109th Congress will advance a major step in the direction of circumscribing and promoting fair, early settlement of seaman wage disputes. To avoid repetition in this testimony, the substantive legal consequences of this identical

proposed amendment are discussed below in the context of Chapter 105 dealing with coastwise voyages.

COASTWISE VOYAGES

Section 10504 in Chapter 105 of Title 46 is addressed to when seamen on coastwise voyages may obtain portions of their wages. The proposed amendments are to 10504(b) and (c). The section does not apply to fishing vessels, whaling vessels or yachts, and portions of it do not apply to vessels taking oysters. It does apply to foreign vessels while in United States ports.

Section 10504(b) of Title 46 currently reads:

> (b) The master shall pay a seaman the balance of wages due the seaman within 2 days after the termination of the agreement required by section 10502 of this title or when the seaman is discharged, whichever is earlier.

The proposed amendments strike subsection (b) and substitute the following:

> (b) Subject to subsection (d) of this section, the master shall pay a seaman the balance of wages, less permitted deductions and withholdings, due the seaman, on the earlier of-
> (1) 2 days after the termination of the agreement required by section 10502 of this title for a seaman on a cargo vessel,
> (2) 30 days from the commencement of the voyage for a seaman on a passenger vessel, or
> (3) when the seaman is discharged or the employment ends.

As noted, the language of the proposed amendment for coastwise voyages cited immediately above is substantively identical to the proposed text amendment inserted above in Section 10313 (f) for foreign and intercoastal voyages. The legal result clearly intended by the proposed amendments is to treat seaman wage disputes the same whether they arise in foreign and intercoastal or coastwise voyages.

Paragraph (c) of Section 10504 of Title 26, United States Code, currently reads:

> (c) When payment is not made as provided under subsection (b) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days wages for each day payment is delayed.

As we saw in Section 10313(g) above, the proposed amendments for Section

10504 strike “When” in paragraph (c) cited immediately above and insert two paragraphs, the first of which reads as follows:

> (1) Subject to subsection (d) of this section, and except as provided in paragraph (2), when.

The second paragraph proposed for amendment in Section 10504 has the same text as was inserted in Section 10313(g) (2) above dealing with foreign and intercoastal voyages. Again, the intention is to authorize and require the same application of law with respect to similar cases, regardless of whether the dispute involves foreign and intercoastal or coastwise voyages. Thus, we reach the heart of the new procedural due process protections in penalty wage cases.

Current law imposes no obligation on seamen serving on passenger vessels to notify the master, owner, operator or employer in writing of disputed wage claims. The proposed amendments give the seaman 180 days to tender **written notice**, but only after the seaman’s receipt of the information indicating a disputed payment. Alternatively, the seaman’s notice obligation arises 30 days after the termination of the seaman’s employment contract, *whichever occurs later*.

These new notice provisions are slanted in the favor of the seamen who now work on passenger vessels. Common sense tells us that seamen and employees in general scrutinize the amounts they are paid and are usually outspoken about wage disputes. The underlying premises of the 1790 law and its even harsher subsequent amendments at the turn of the century distort the diligence and intelligence of modern seamen and exaggerate the extent to which cruise lines and other passenger-vessel employers act in bad faith. My view is that both groups deserve more respect, and I submit that modern laws should assume that individuals are reasonably intelligent and normally honest. American law is not unfair in expecting seamen as well as masters, owners, operators and employers to act as responsible persons by giving timely notice and an early opportunity to settle potential wage disputes amicably. Indeed, such due process requirements are commonplace throughout American law. Compliance with the truly draconian United State Tax Code and its filing requirements imposes far more confusing and burdensome legal obligations than the relatively straightforward notice and opportunity to remedy requirements in the proposed amendments. Public policy interests also are served by requiring the master, owner, operator or employer in the proposed amendments to act more promptly than seamen to deal with their written notice *i.e.*, within 60 days. The disparity in positions and resources between the two groups, in my view, justifies giving more time for seamen to act. The point is that all concerned parties, seaman, masters, owners, operators and employees deserve equitable and fair treatment before the law.

Part of what is manifestly unfair about the existing law is that the payer is penalized even if he is completely unaware of the potential wage dispute. And that

penalty can be grossly disproportionate reading the code as currently written. The leading case is this area of law is Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). The U.S. Supreme Court chose to adopt a literal (not a "liberal") construction of the existing code text and, in a split decision, held that the district courts have no discretion to limit the period during which the wage penalty is assessed. The decision in Griffin allowed the failure to pay a single seaman $412.50 to amount to a penalty award of over $300,000. Such a penalty award is grossly disproportionate by any reasonable standard. The Court placed the blame for endorsing what is on its face a grossly disproportionate award by stating that the remedy for dissatisfaction with the results in the case lies with Congress that had the power to amend the statute, which the Court did not. In legal effect, the United States Supreme Court threw equity out the window in that case and stated that Congress had to do the fix. I can not understand how the words contained in the statute i.e. "without sufficient cause" can be construed not to reflect equitable legal content. My view is that Griffin was a bad decision that is understandable only if the Supreme Court deliberately wanted to goad the Congress into updating the law.

At present, the failure to pay even $1 that is later determined by a jury to be "without sufficient cause" automatically requires a court to impose a penalty of two days full wages for every day that dollar remained unpaid. A maritime employer's first notice of a wage claim may be in the form of a lawsuit filed years after the fact, since there is no requirement in the current law for the seaman to give notice of a claim or make a demand. The penalty in the Code is the same regardless of the amount of the wages in dispute.

By comparison, my understanding is that the Fair Labor Standards Act allows an employee to file a private lawsuit seeking unpaid minimum wages or overtime wages plus an additional amount equal ***only*** to the wages sought. Thus, an employee can seek double the amount owed in damages, in addition to attorney's fees. *See* 29 U.S.C. § 216(b). The employee can not recover, under any circumstances, twice his *total* daily wage for every day the claim remained outstanding, even if unasserted.

Comparison between wage laws on land and the penalty wage statutes at sea raise a constitutional question in my mind of equal protection under the law. But as noted, the proposed amendments still lean over backwards towards seamen by leaving in place the penalty of 2-days wages for each day any amount of payment is delayed. The proposed amendments can only be seen to reflect confidence that seamen's wage claims will be properly handled if the passenger vessel master, owner, operator or employers know about the grievance and have a reasonable time to either settle the dispute or put the amount in dispute in trust until the issues are resolved. To repeat, the proposed amendments leave in place the penalty wage provisions in existing law but introduce notice and an opportunity to remedy – procedures designed to settle disputes in a timely manner. I believe this is good public policy and the proposed amendments are a major improvement in this area of maritime law.

Lastly, under the proposed amendments to Sections 10313 and 10504, the seaman's failure to give the statutory notice is a bar to any claim by the seaman or the imposition of a wage penalty on the master, owner, operator or employee. Such a bar is commonplace in American law, and an inherent requirement to give any meaning to due process. An efficient functioning judiciary is in the public interest and, by and large, the calendars of courts in the United States are overcrowded. My view is that the present law is so outdated that it actually provides an incentive for seamen to hold off on asserting claims (which as in Griffin can be for relatively minor amounts) to take advantage of the huge wage penalty provision windfall. Existing law actually promotes unnecessary work for the courts. My judgment is that the proposed amendments promote early settlement of disputes while dealing fairly in a customary and evenhanded way with all concerned parties. Time limits for the assertion of claims by seamen are sound public policy typically seen as beneficial to the American judicial system.

STATUTE OF LIMITATIONS

The existing law in this area is inadequate from another public policy point of view: there is no uniform statute of limitations. The federal courts in penalty wage cases have had to resort to the application of the relevant statute of limitations for the state where cases concerning the disputes are brought. As is predictable, claimants shop for the forum that is most favorable to their particular case. This is bad public policy for different results for nearly identical cases occur which cannot be credibly argued as fair or conducive to the principle of equal treatment under the law. For example, recent cases have been brought in the State of New York which has a six year statute of limitations; such cases would not be allowed in states with shorter statutes of limitations.

The statute of limitations generally refers to the time period after an incident occurs during which a lawsuit may be filed regarding the incident. The public policy rationale underlying a limitation on the initiation of legal disputes is to encourage the timely settlement of legal grievances before an undue passage of time obscures evidence and prejudices fair adjudication. The doctrine evolved out of common sense experience and common law concepts such as due process and equity. One point that especially reinforces the need for a change to the 1790 law as amended was noted above in that current law does not mandate that the payer even have **notice** of the payee's claim. That is, even if the seaman is well aware of the claim, he (or she) has little incentive, let alone obligation, to notify the master, owner, operator, or employer of the claim. Even with no knowledge of the claim, the payee is required to render payment, including penalties under existing law. As mentioned previously, wage penalties can accrue to an almost unbelievable amount if the jury finds the reason for the delay is "without sufficient cause." The master, owner, operator or employee may, in fact, agree with the seaman before the court that the payment was withheld without sufficient cause. Perhaps the paymaster was a crook or an accountant made a bookkeeping error that a fair-minded payee readily agrees should have been caught. The interests of justice are not served by grossly disproportionate remedies being endorsed as the law of the land. Public respect for the rule of law is not advanced by strict enforcement of outmoded laws written for an earlier era. Fundamental fairness as reflected in modern doctrines of due process dictate

that those against whom the legal grievance is alleged have notice of the claim and a reasonable opportunity to take corrective action. Moreover, public policy is not served by burdening the court system in the United States with stale claims.

Thus, if a statute of limitations is desirable, how much elapsed time is fair for seaman wage cases? For foreign and intercoastal voyages, the proposed amendments are to Section 10313 of Title 46 that adds a new subsection (k) to read:

> (k) An action under subsection (g) (2) of this section shall be commenced within three years of the date of the commencement of the voyage for which the wages are claimed.

Likewise, for coastwise voyages, the proposed amendments are to Section 10504 by adding a new subsection (g) to read:

> (g) An action under subsection (c) (2) of this section shall be commenced within three years of the date of the commencement of the voyage for which the wages are claimed.

An argument can be made that the selection of any number limitation to end disputes is arbitrary. To ascertain what time limits are reasonable, law makers and courts typically seek to provide similar treatment for similar cases. The first precedent that comes to mind is to look at the wage protections afforded most employees performing similar work on land in the United States. In such instances, my understanding is that the Fair Labor Standards Act applies a two-year statute of limitations for wage disputes, except in cases of proven willful violations where a three-year statute of limitations applies. It seems reasonable to me that the proposed amendments with a three-year statute of limitations commencing with the voyage in question promotes nearly equal and uniform treatment for shore-side workers and seamen alike. Treating similarly situated individuals similarly is fair as well as sound public policy and the proposed three year statute of limitations ought to be made law.

CREW BENEFITS

Turning to other provisions proposed for amendment, the first sentence of paragraph (f) of Section 10313 of Title 46 reads:

> At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier.

The amendment proposed as a substitute for the foregoing first sentence reads:

> At the end of a voyage, the master shall pay each seaman the balance of wages less permitted deductions, withholdings, allotments due the seaman within the earlier of –
> (1) 24 hours after the cargo has been discharged for a seaman on a cargo vessel,
> (2) 30 days from commencement of the voyage for a seaman on a passenger vessel, or
> (3) 4 days after the seaman is discharged, or the employment term ends. (emphasis added)

A new subsection (j) for Section10313 also is proposed to read:

> (1) In the case of a passenger vessel, nothing in this section or in sections 10314, 10315, or 10316 prohibits the master, owner, operator, or employer from deducting or allotting from the seaman's wages expenses incurred, with written consent of the seaman in the employment agreement or other writing, which written consent shall be renewed annually, for-
>
> (A) premiums payable to a licensed insurance provider eligible to issue health, life, accident, or disability insurance for the seaman or his family, unless otherwise prohibited by law; or
> (B) deposits permitted by section 10315(e).
> (2) Deductions withheld under paragraph (1) (A) of this subsection shall be disclosed to the seaman in writing and may not exceed 10 percent of the total earnings paid (including tips and overtime) to the seaman from which the deduction was made during the current pay period.

The merit of the above proposed amendments is a self-evident attempt to modernize the handling of wages by passenger vessels in Title 46. First, subsection j (1) (A) permits certain limited deductions, when the seaman so expressly directs in writing, of various benefits for the seaman or his/her family. The deductions are only for benefits not owed already to the seaman by maritime employers, such as maintenance and cure (a daily living allowance and payment of medical bills for injuries or illnesses while in the service of the ship).

Further wage handling improvements are offered for Sections 10314 and 10315. Section 10314 of existing law forbids advance payment of wages to seamen prior to the commencement of the seaman's employment and provides civil penalties for enforcement. This section prohibits the use of employment agencies for hiring seamen and several other, none germane provisions. Section 10315 lists the persons to whom a seaman may allot wages, specifies the conditions which make an allotment valid, and provides a civil penalty for falsely claiming qualification as an allotee. Compliance with both Sections 10314 and 10315 is required before a foreign or United States flag vessel can be cleared from a United States port. Section 10316 qualifies the two previous

sections by allowing an employer to make deductions from a seaman's wages for the purpose of placing the wages into a trust fund or holding them in trust to provide for the seaman's benefit.

Amendments to implement part of the new 10313(j) are proposed by inserting conforming text for Sections 10316, 10314(a) (1), and 10315(b) and (c) with a new sentence at the end of subsection (e) of 10315 to read:

> However in the case of a seaman employed on a passenger vessel, nothing herein shall prevent the master, owner, operator or employer, pursuant to the employment agreement or other writing signed by the seaman, from making any allotment permitted by this section or making deposits into a checking, savings, investment or retirement account in any financial institution or to an agent other than the master, owner, operator or employer, designated by the seaman for deposit into such account.

The combined legal effect of the proposed amendments, including technical conforming amendments, is to allow all seamen on passenger vessels in a foreign or intercoastal voyage to request a deduction *in writing* from wages to cover payment of premiums for health, life, accident or disability insurance for the seaman or his family. The proposed amendments deal with an acute, practical problem in existing law by allowing the direct deposit of wages into a foreign crew member's bank account, even in an overseas country. The proposed amendments take into account inherent differences between the typical "crew" of cargo as contrasted with passenger vessels. The language provides different procedures for the payment of the respective wages on cargo or passenger vessels given that the needs of the two industries and their seamen are now different. Major safeguards against abuse and, indeed, against the spawning of unproductive disputes are the requirements that the wage deduction take place only upon *written request* from the passenger ship seaman within a cap of 10 percent of total earnings paid. In my view, such requirements in the proposed amendments provide updates with clarity and uniformity in practice that is well designed to serve the best interests of all concerned parties and are therefore sound public policy.

The proposed amendments also add a new subsection (f) (1) and (2) to Section 10504 that conform the provisions for coastwise voyages with the textual changes proposed for Chapter 103 covering foreign and intercoastal voyages (see proposed amendments and comments above on Section 10313 (j) (1) and (2)).

Section 10505 prohibits any person from paying a seaman on a coastwise voyage advance wages, or paying another person any form of a seaman's wages prior to the commencement of the seaman's employment. The section also prohibits a person seeking or receiving remuneration for providing a seaman with employment and requires that a vessel comply with this section before clearing port with penalties for offenses of its provisions. The section does not apply to fishing vessels, whaling vessels, or yachts, but does apply to vessels taking oysters.

The proposed amendments bring coastwise voyages into conformity in this regard by changing the text in Section 10505(a) (1) to read:

> Except as provided in section 10504(f), a person may not….

Section 10506 permits deductions from wages of seamen on coastwise voyages if the deductions are to be used for the benefit of the seamen or their families. The proposed amendments retain the existing law by inserting "a" at the beginning of Section 10506 and adding a new subsection "b" to read:

> (b) Nothing in this section applies to deductions authorized by section 10504(f).

The net legal effect of the proposed amendments is to allow all seamen on passenger vessels to request a deduction from wages to cover payment of premiums for health, life, accident or disability insurance for the seaman or the seaman's family. They also allow for direct deposits into a foreign crew member's bank account in his or her home country (if he or she wishes it there). The proposed amendments empower seamen to deal more effectively and efficiently with the daily problems of life in modern times, and they reflect the way masters, owners, operators and employers of passenger vessels prefer to do business in the 21st century. In my view, the proposed amendments are fair updates of the existing law.

In conclusion, Mr. Chairman and other Subcommittee Members, I thank you for the opportunity to present my views on the wage penalty and related due process provisions of the law in Title 46 of the United States Code. From my perspective, the proposed amendments provided for my review by the Subcommittee are, as a whole, fair and sensible updates of the existing law. They provide reasonable rights and obligations with procedural due process safeguards for all concerned parties. Adoption of the proposed amendments will bring the antiquated wage penalty provisions in Title 46 more into conformity with the passenger vessel and crew conditions in the 21st Century. By exercising its constitutional powers to legislate sound public policy, Congress will not only be responding forthrightly to the challenge posed by the United States Supreme Court but also be remedying the inadequacies and inequities in existing law for wage penalties.